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The Development and Operational Impact of Indonesia's Approved Partial System of Archipelagic Sea Lanes

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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Introduction

Air and sea routes crucial to the mobility of U.S. forces in the Asia-Pacific theater of operations traverse the Indonesian archipelago. U.S. planners involved in preparing and executing military operations in this theater must be knowledgeable concerning abstract features (in the form of international law) effecting the transit of our forces through this vast archipelago. The rules of international law with regard to the operating rights of U.S. forces through this archipelago are largely unaffected by an armed conflict (unless it is between Indonesia and the U.S.). However, because of legal and historic developments in this century, it is at best uncertain that these rules will be respected by Indonesia or other nations.

This paper describes the geographic importance of the Indonesian archipelago and the rules of international law applicable to the transit of U.S. forces through it in peacetime as well as war. It then describes Indonesia's efforts to obtain international approval for a partial system of 3 archipelagic sea lanes within its archipelago and U.S. efforts to ensure the transit rights of U.S. forces were protected during this process. It is the thesis of this paper that the approved partial system of archipelagic sea lanes protects the transit of rights of U.S. forces and will not effect operational planning and execution of military operations through the archipelago.

Physical Features of the Indonesian Archipelago

Within the Asia-Pacific theater of operations, large ocean areas separate widely dispersed but geostrategically important countries. Because of this geography, U.S. operational planners seeking to obtain the freedom of action necessary for our forces to

reach an assigned military objective in the theater must especially consider the availability and location of sea and air routes. These routes will be a crucial component in balancing the operational factors of space, time and force when conducting either military operations within the theater or deploying out-of-theater in support of another combatant command (most likely Central Command).

The attention of Pacific Command operational planners will quickly be drawn to the theater's most important routes, those traversing the Indonesian archipelago, which is strategically located in the center of the Asia-Pacific region. Their importance is illustrated by the fact that the sea lines of communication (SLOCs) both within and immediately adjacent to this archipelago are a crossroads for world shipping, with over one-third of the world's merchant vessels (constituting more than half of the world's shipping capacity) transiting through them each year.[1] This is no surprise given Indonesia's vast size, stretching approximately 3200 miles across the Pacific and including some 13,667 islands.[2] Adjacent to these islands is an astonishing 764,000 square nautical miles of water (internal, archipelagic, and territorial) which is subject to the sovereignty of Indonesia.[3]

Although this ocean area is vast, the location of the islands and the depth of water in the straits between them limit the number of SLOCs suitable for the transit of large ships traveling between Africa or Suez to North Asia, and between Australia and North Asia. The resulting SLOCs, which extend either through or adjacent to the Indonesian archipelago, flow through five straits areas. These straits areas are "decisive points" since unimpeded access by U.S. forces could exert a decisive influence on the outcome of U.S. military operations in the theater due to the importance of mobility of our forces.[4]

The 5 straits areas are (Figure 1)[5]:

Malacca Strait: Considered to be the second busiest strait in the world, it is the shortest route between Suez and the Arabian Gulf to North Asia. Nonetheless, it is draft limited to 72 feet, with shipping lanes narrowed to 1.5 miles wide at the east end of the waterway.

Sunda Strait: Currently little used by international surface traffic, it is nonetheless the most direct route between the Cape of Good Hope to North Asia. The Strait has a tricky channel and some draft limitations. A live volcano (Krakatoa) occasionally erupts, creating new islands which have partially obstructed the Strait in recent times.

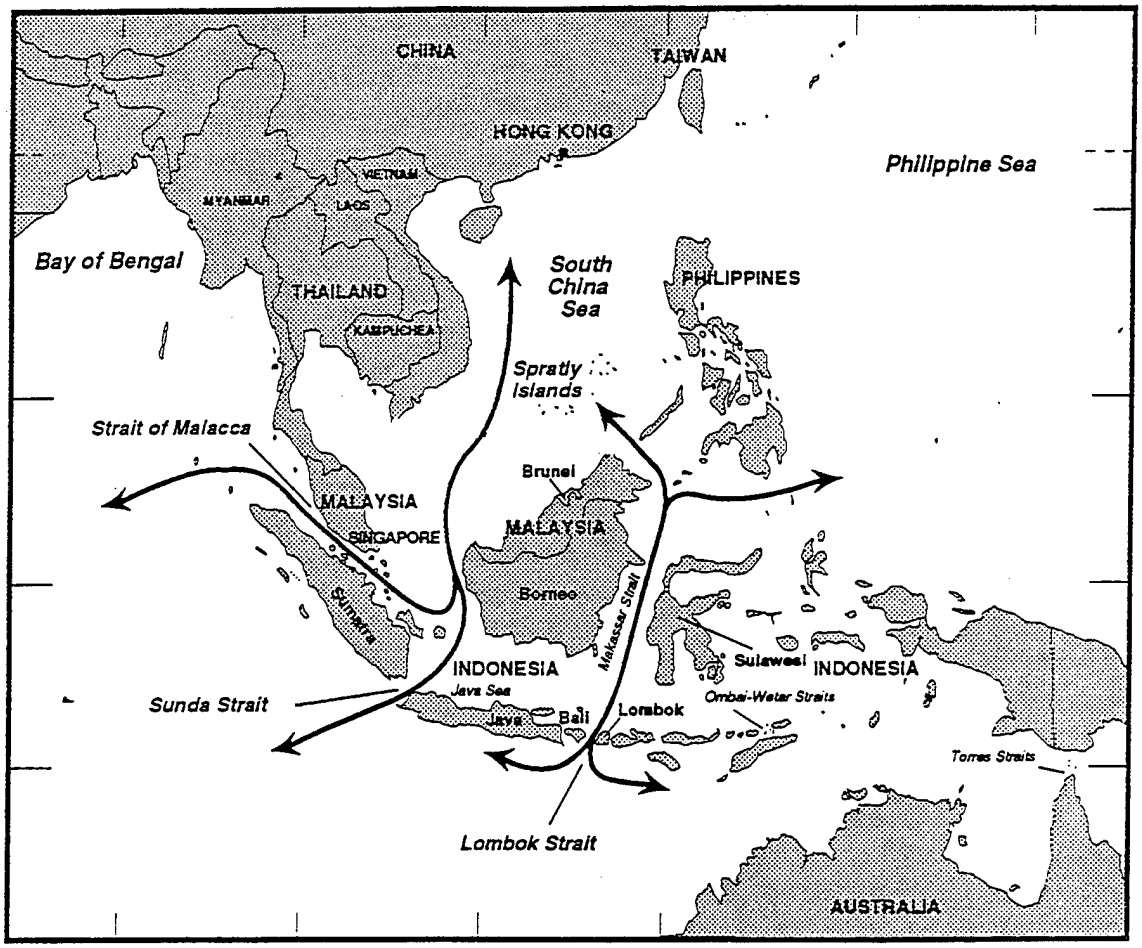
Lombok and Makassar Straits: An important route for Australian north-south trade, but is currently little used for east-west transits. These are also the only straits in the archipelago not draft limited.

Ombai-Wetar Straits: Although it is possible to cautiously navigate through these straits, they are currently little used by international shipping.

Torres Strait: At the south-western edge of the Indonesian archipelago, the strait is draft limited to 39.4 feet, making it unsuitable for use by large, fully laden merchant ships and many warships. As a result, few long-haul merchant ships use this strait.

Abstract Features of the Indonesian Archipelago

Limitations imposed by international law on the operations of military forces transiting archipelagoes are important abstract (intangible) features affecting the employment of our forces which must be taken into account by operational planners.[6] It is the general policy of the United States for its military forces to operate in accordance international law as reflected in the Law of the Sea Convention[7] with regard to navigation and overflight. In this regard, U.S. forces are to respect the maritime claims of other nations which are consistent with the Convention so long as those nations in turn respect U.S. rights and freedoms within areas of their claims.[8] More generally, and consistent with this policy, naval commanders are required to observe international law.[9]



5 Key straits Areas in

the Indonesian Archipelago

Figure 1

Operational planners need to understand what international legal limitations apply to air and sea transits in this vital region in developing operational plans. The foundation for understanding these limitations is Indonesia's status as an archipelagic state[10], and its establishment of archipelagic baselines[11] which have been recognized by the U.S.[12] The extent of the operating rights for our military forces within the Indonesian archipelago will largely depend upon whether the transits involve overflight of Indonesian islands, or navigation (surface or sub-surface transit by ships or submarines) and overflight of its internal waters, archipelagic waters, territorial sea or through an international strait. An understanding of the characteristics of each of these abstract features is therefore important to understanding the extent of our operating rights.

Extent of Sovereign Air, Sea, and Land Space of Indonesia

Under international law, Indonesia has complete and exclusive sovereignty over its land and internal waters and the airspace above them.[13] (Indonesian internal waters would be landward of the mouths of rivers and bays, and the harbor works of ports.[14]) Next, subject only to certain international navigation and overflight rights, Indonesia also has complete sovereignty over its archipelagic waters and territorial sea and the airspace above them. As prescribed by international law, Indonesia's archipelagic waters extend seaward from the low-water line along the coasts of its islands to the archipelagic baselines it has established (joining the outermost points of its outermost islands and drying reefs).[15] Indonesia's territorial sea then extends seaward from these baselines for the authorized distance of 12 nautical miles.[16] Finally, Indonesia has sovereign rights (though not sovereignty) over the natural resources within the water, seabed and subsoil

of an exclusive economic zone (EEZ) and jurisdiction with regard to certain activities related to these resources.[17] Indonesia, as authorized by international law, has established an EEZ extending seaward from the outer edge of its territorial sea.[18]

Current Peacetime Aircraft Transits of the Indonesian Archipelago

For operations during peacetime (during which neither the U.S. nor Indonesia are engaged in an international armed conflict), international law requires **aircraft** including military aircraft) transiting over the **land and internal waters** of Indonesia to obtain its permission to do so. Permission is usually obtained by filing flight plans in accordance with International Civil Aviation Organization (ICAO) procedures and using assigned international air routes.[19]

Military aircraft may also transit the Indonesian archipelago without seeking the permission of Indonesia by flying over its **archipelagic waters and territorial sea** pursuant to the right of archipelagic sea lanes passage.[20] Despite its name, this right may be exercised even when an archipelagic state has not yet designated any sea lanes. When this is the case, military aircraft must fly above normal passage routes used for international navigation.[21] Military aircraft wishing to transit over the archipelagic waters or territorial sea of Indonesia outside normal passage routes must first obtain the permission of Indonesia to do so.

Civil aircraft also have a right to archipelagic sea lanes passage over normal passage routes through Indonesian **archipelagic waters and territorial sea**. However, unlike military aircraft, they must also observe ICAO procedures, and use established international air routes.[22] Because the current air routes established by ICAO do not

overfly normal passage routes, civil aircraft at present may not exercise this right, and must therefore have Indonesian permission to overfly its archipelagic waters and territorial sea. Given the U.S. military reliance upon contracted civilian aircraft for transport of personnel and equipment during surge operations, this restriction could significantly impact our ability to quickly deploy our forces should Indonesia refuse overflight rights. Whether or not ICAO would quickly alter international air routes in the region to follow normal passage routes is an open question. It should also be noted that like military aircraft, civil aircraft wishing to overfly Indonesian archipelagic waters and territorial sea outside normal passage routes must always obtain Indonesian permission.

Neither military nor civilian **aircraft** operating in the international airspace over the **EEZ** need Indonesian permission to do so. International law provides for freedom of overflight in this area and for other internationally lawful uses of the sea related to it.[23] In exercising this freedom, aircraft must have due regard for the interests of other nations, including the economic interests of Indonesia.

Current Peacetime Ship and Submarine Transits of the Indonesian Archipelago

All **ships and submarines** may transit throughout the **archipelagic waters and territorial sea** portions of the Indonesian archipelago pursuant to the right of innocent passage.[24] Submarines in innocent passage must navigate on the surface and show their flag. Such passage by both ships and submarines must be continuous and expeditious and is restricted to activities directly bearing on passage. Among the restricted activities considered not to be related to passage which are of special concern to military ships and submarines are: launching, landing or taking on board aircraft; collecting information to

the prejudice of Indonesia; conducting research or survey activities; or threatening or using force against Indonesia. Indonesia is authorized to temporarily suspend the right of innocent passage on a non-discriminatory basis in specified areas when essential for the protection of its security.

All **ships and submarines** may also transit Indonesian **archipelagic waters and territorial sea** pursuant to the right of archipelagic sea lanes passage. As with aircraft, this right may be exercised in all normal passage routes. It is the U.S. position that the number of normal passage routes is ever evolving based upon changing usage by international maritime navigation and commercial trends.[25] U.S. military ships, submarines and aircraft are therefore not limited to transits in any specified normal passage routes, but are allowed to continue to evolve such routes through selection of navigational tracks chosen solely on the basis of mission needs. Since normal passage routes can exist anywhere within the archipelagic waters and territorial sea of an archipelagic state, transits may be made from the low water line of islands to the outer edge of the territorial sea. The result is that military aircraft, ships and submarines can operate more freely and closer to Indonesian islands than they could before the archipelagic waters regime was part of international law since each Indonesian island had its own belt of territorial sea.

The international legal right of archipelagic sea lane passage means navigation (in the case of ships and submarines) and overflight (for aircraft) through Indonesia's archipelagic waters and territorial sea solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or its EEZ and another part of the high seas or its EEZ. It should be noted that unlike the right of innocent passage in the

territorial sea, the right of archipelagic sea lanes passage may not be temporarily suspended within normal passage routes.

In exercising this right, **aircraft, ships and submarines** are authorized to operate "in the normal mode", which includes submerged transit for submarines and, the launching, landing or taking on board of aircraft for surface ships.[26] It also includes activities necessary to their security, such as formation steaming[27] and the use of sensors to detect potential threats. While weapons exercises do not seem to be fairly included (given the restriction on operations limited solely to transit), other exercises internal to the platforms involved (such as computer-simulations) would appear to be permissible. Similarly, exercises or training conducted as part of operations related to passage would be permissible (e.g. aircraft operating to identify and respond to potential threats to a battle group).

It should also be noted that significant portions of the vital Strait of Malacca are completely covered shore to shore by Indonesian and Malaysian territorial seas and that there are no Indonesian archipelagic waters within the Strait.[28] Since no Indonesian archipelagic waters exist in the Strait, this raises the question of whether a right of archipelagic sea lanes passage exists within it. Although not a certainty, it would appear from a close reading of the Law of the Sea Convention that the right of archipelagic sea lanes passage applies only within the territorial sea of an archipelagic state when a sea lane or normal passage route proceeds from within its archipelagic waters and then continues into an adjacent portion of its territorial sea.[29] This does not occur within the Strait of Malacca. Fortunately from an operational standpoint, even if no right or archipelagic sea lanes passage exists in the Strait, it remains unquestionably true that it is

an international strait through which all ships and submarines and all military aircraft have the right of transit passage.[30] Since transit passage and archipelagic sea lanes passage rights were intended to provide functional equivalent operating rights for ships, submarines and aircraft, operational planners need not be concerned over which of the two regimes apply to forces transiting the Strait.[31]

Within the **EEZ**, all **ships and submarines** are entitled to freedom of navigation and other internationally lawful uses of the ocean related to it.[32] In exercising this freedom, ships and submarines must have due regard for the interests of other nations, including the economic interests of Indonesia. The U.S. considers this freedom (along with the freedom of overflight for aircraft) to include military operations, exercises and activities.[33]

Current Wartime Transits of the Indonesian Archipelago

Should war break out tomorrow involving either the United States or Indonesia, it will be important for operational planners to know how the operating rights (especially transit rights) of U.S. forces through the Indonesian archipelago would be effected. However, before offering further advice to operational planners, they must first be cautioned that the international law regarding neutrality, which attempts to define the legal relationship between nations engaged in a war (belligerents) and nations which choose not to take part in it (neutrals), is uncertain at best and extinct at worst. This is so because both the legal theory regarding war and the conduct of nations (upon which customarily international law largely depends) have changed significantly. The Charter of the United Nations, which almost all nations (including the U.S.) are parties, makes

war technically illegal.[34] In addition, because it was the practice of the nations involved in both world wars, including that of the United States, to ignore the traditional law of neutrality, a substantial question arises regarding whether or not most nations continue to recognize it. One scholar has persuasively argued that as a result, rules will be worked out to fit particular conflicts and which will only be considered as "international law" in its loosest sense.[35] Nonetheless, other scholars make the undeniably practical point that the traditional law of neutrality is the only existing body of rules detailed enough to provide needed regulations governing the behavior of belligerents toward neutral nations.[36]

Given this need, both the Navy[37] and a growing body of international legal scholars[38] have continued to rely upon the traditional law of neutrality, updating it where necessary to take into account the new maritime areas reflected in the Law of the Sea Convention. However, the extension of the traditional rules to these new maritime areas itself raises an additional legal question.[39] Because of the practical need and the Navy's continued reliance, this paper proceeds on the same basis that traditional neutrality law continues to be viable and can be applied in the new maritime areas. However, it does so with the caution that recognition of these rules by other states is at best uncertain. Three war scenarios are possible: Indonesia and the U.S. as opposing belligerents; Indonesia as a neutral and the U.S. as a belligerent; Indonesia as a belligerent but the U.S. as a neutral.

Scenario 1: Indonesia & U.S. As Opposing Belligerents

The first scenario, although the most unlikely, is also the easiest and clearest to deal with. Under the long-standing international law of belligerency and neutrality, the

U.S. may conduct military operations against Indonesian forces within and over their **territory, inland waters, territorial sea** and within and over the **high seas.**[40] Military operations within and over Indonesia's **archipelagic waters and EEZ** (maritime zones which have existed only since the signing of the Law of the Sea Convention) can also reasonably be said to be authorized. This is because it would be consistent with traditional international law, which permits military operations in and over areas where the enemy exercises sovereignty, such as the territorial sea (archipelagic waters being similar in this regard) as well as in and over the high seas (the EEZ, with its freedoms of navigation and overflight, being similar in this regard).[41] While U.S. forces may lay mines in Indonesian internal waters, archipelagic waters and territorial sea, they may not deny the right of neutral vessels to archipelagic sea lane passage in normal passage routes nor the right of transit passage in international straits.[42]

Scenario 2: Indonesia as Neutral/ U.S. as Belligerent

The second scenario (Indonesia as a neutral and the U.S. as a belligerent) involves a greater reliance on the law of neutrality. Therefore, the extent to which Indonesia and other nations will accept these rules is more uncertain. Under the traditional law of neutrality, a belligerent must respect the sovereign rights of a neutral state, and therefore may not violate its neutrality by engaging in an act of hostility within areas which it is sovereign.[43] Overall, this means U.S. forces would be limited to their peacetime rights of transit in these areas. U.S. forces would be precluded from using Indonesian territory, internal waters, archipelagic waters or territorial sea as a base of operations.[44]

U.S. **military aircraft** would be forbidden to operate over Indonesia's **territory, internal waters, archipelagic waters, and territorial sea**, but would retain their rights to archipelagic sea lanes passage and transit passage.[45] All U.S. **military ships and submarines** are authorized "mere passage" within **Indonesia's archipelagic waters and territorial sea**, subject to Indonesia's right to close some or all of these waters on a non-discriminatory basis.[46] In addition, all **ships, and submarines and all military aircraft** retain their right of archipelagic sea lanes passage through and over normal passage routes within **archipelagic waters and the adjacent territorial sea.**[47] All **ships, and submarines and all military aircraft** also retain their right of transit passage through and over **international straits.**[48] Finally, within the Indonesian **EEZ**, all **ships, submarines and aircraft** continue to retain the same freedoms of navigation and overflight and other internationally lawful uses of the ocean related to it.[49] These freedoms are subject to the duty of due regard for the interests of other nations, including the economic interests of Indonesia.

U.S. forces may neither visit and search nor capture or destroy merchant vessels in Indonesian internal waters, archipelagic waters, international straits, or territorial sea. This restriction applies even while in archipelagic sea lane passage and transit.[50] Similarly, U.S. forces may not mine these waters.[51] Neither of the above two restrictions apply within the Indonesian EEZ.

Under traditional neutrality law, a neutral nation must exercise surveillance of its sovereign areas to prevent violations by belligerent forces. If it fails in this duty and a belligerent uses its land or sovereign water for hostile activity, international law authorizes the opposing belligerent to use force to counter the activities of the enemy

forces. Belligerent forces are also authorized to act in self-defense when attacked within or from neutral areas.[52] Because of the vastness of Indonesia's archipelagic waters and territorial sea, it would be almost impossible for it to prevent violations by a determined belligerent. From an operational perspective, a vast maritime space cannot be successfully defended.[53] History also suggests that regardless of international law, a belligerent nation is unlikely to concede to an enemy a safe haven for long transits through SLOCs, especially if they are vital to the enemy's success.[54] Given this reality, operational planners should prepare branches to plans which assume that Indonesia will be drawn into the conflict, or that a different set of rules will emerge with regard to neutral rights of archipelagic states.[55]

Scenario 3: Indonesia as Belligerent/ U.S. As Neutral

The third scenario (Indonesia as a belligerent and the U.S. as a neutral) presents the least threatening possibility. Besides normal transits of deploying forces, U.S. ships and aircraft may be expected to escort U.S. and friendly neutral merchant ships through the SLOCs in order to ensure trade is not disrupted and freedom of navigation is assured.

All neutral **ships and submarines** are authorized "mere passage" within Indonesia's **archipelagic waters and territorial sea**, subject to Indonesia's right to close some or all of these waters on a non-discriminatory basis.[56] All neutral **ships, submarines and all military aircraft** continue have a right to archipelagic sea lanes passage and transit passage through Indonesian waters despite its belligerent status.[57] Since normal passage routes are not charted by Indonesia, operational planners should

expect Indonesian forces to challenge vessels in these waters over the exercise of archipelagic sea lanes passage.

International law is unclear regarding whether or not Indonesian forces may visit and search and capture or destroy merchant vessels in its own **archipelagic waters and territorial sea** when those vessels are in archipelagic sea lanes passage or transit passage.[58] Given that international law requires that these transits be unhampered, the better view would be that Indonesia could not do so. Nonetheless, this would obviously cause significant security concerns for Indonesia, which is therefore likely to conduct these activities. Planners should consider including a branch to their operational plan which would concede the right of visit and search, but provide for convoy of U.S. flagged merchant vessels. Under the traditional law of neutrality, a convoy of merchant ships accompanied by a warship of the same nationality is exempt from visit and search if the commander of the warship certifies to a challenging belligerent warship that the convoy carries no contraband.[59]

Indonesia is authorized to mine its own waters, but in doing so may not deny the rights of archipelagic sea lanes passage in normal passage routes and transit passage in international straits to neutral ships and submarines.[60] The ability of neutral warships to clear mines in the sovereign waters of a belligerent nation is open to question, but the better view is that U.S. warships may remove mines laid by Indonesia in its archipelagic waters and territorial sea to the extent necessary for U.S. ships and submarines to exercise the rights of archipelagic sea lanes passage and transit passage.[61]

Normal ICAO air routes would be disrupted if Indonesia closed its national airspace due to the war. In response, ICAO might modify international air routes in the

area to be collocated above at least some normal passage routes and the Strait of Malacca. This would permit civil aircraft to engage in archipelagic sea lanes passage and transit passage.[62]

Bilateral Consultations on Indonesian Designation of Archipelagic Sea Lanes

In 1991, Indonesia announced that it intended to designate axis lines for archipelagic sea lanes within the Indonesian archipelago. Because the designation of such sea lanes, if not done in accordance with the Law of the Sea Convention, could have significant adverse effect on the navigation and overflight rights through the this vital area, the U.S. (with Department of Defense (DoD) representation) undertook a number of bilateral consultations with Indonesia regarding its plans. During this consultations, two significant issues arose.

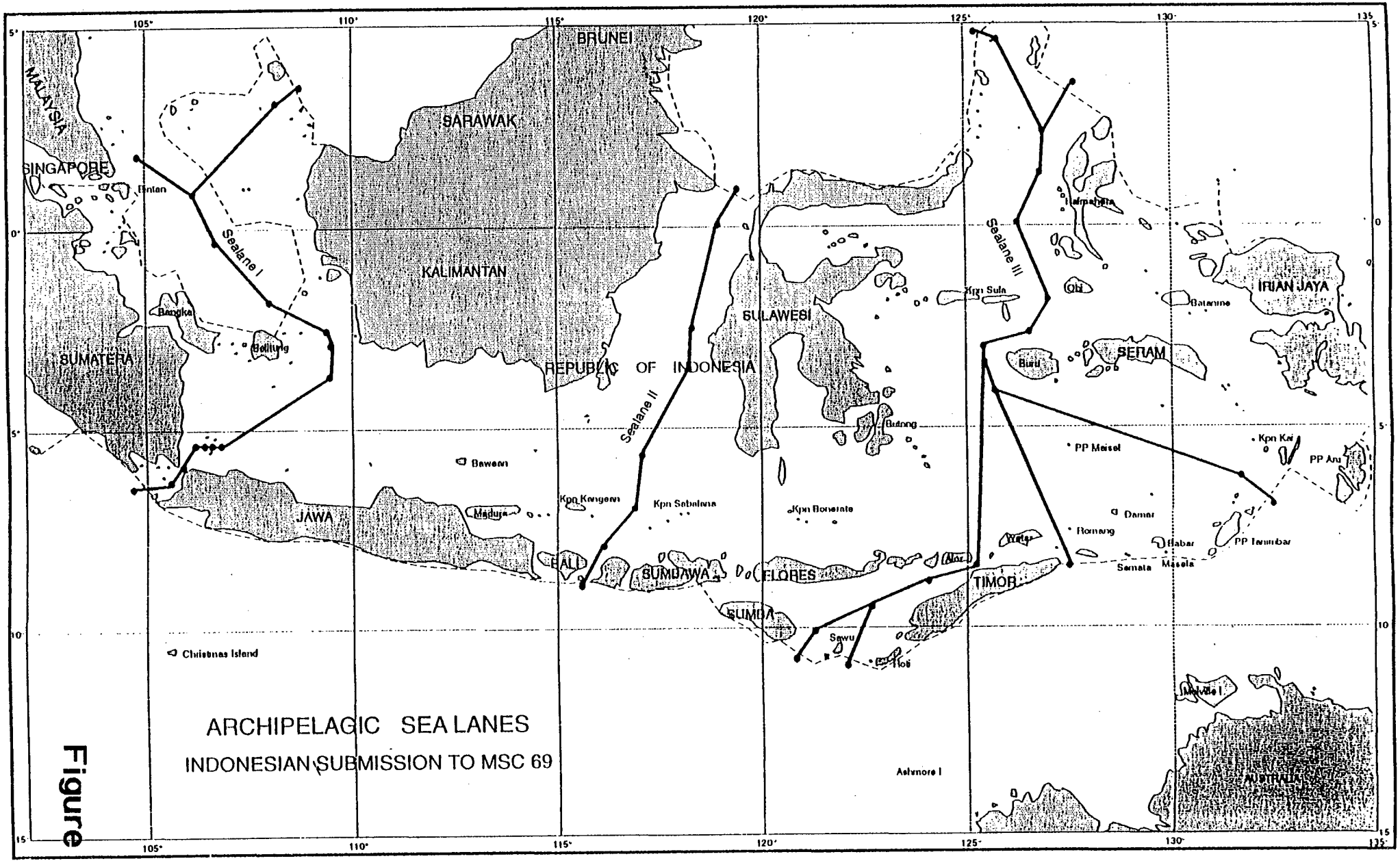
First, the Indonesians indicated they were considering acting unilaterally in designating the sea lanes, without formal international approval. U.S. representatives pointed out that the Law of the Sea Convention requires an archipelagic state proposing to designate sea lanes to "refer proposals to the competent international organization for their adoption... after which the archipelagic state may designate...them."[63] The U.S. was concerned that the navigation and overflight rights reflected in the Convention, particularly those critical to military forces, would be reduced unless there was international supervision of the process of designating sea lanes. The U.S. therefore urged Indonesia to refer proposals for the designation of such sea lanes to the International Maritime Organization (IMO), which it understood from the negotiations of the Convention to be the "competent international organization", for their adoption.

Secondly, the Indonesians indicated they were not likely to propose an east-west sea lane through the Java Sea even though this was a major normal passage route for international navigation. The U.S. pointed out that the Convention requires that if an archipelagic state designates sea lanes, it must include all normal passage routes.[64] The U.S. therefore urged Indonesia not to submit a proposal for designating sea lanes unless it included all normal passage routes in its proposal.[65]

Initial Indonesian Proposal for Designation of Archipelagic Sea Lanes

In August, 1996, Indonesia nonetheless submitted a proposal for the designation of only three archipelagic sea lanes to the IMO, and requested that the IMO adopt them.[66] (See Figure 2, which shows the axis lines for the proposed sea lanes as adopted, not their full width.) The U.S. response to the proposal at IMO indicated disappointment that not all normal passage routes had been proposed for adoption as sea lanes.[67] Nonetheless, the U.S. indicated support for further consideration of the proposal at the IMO due to a provision in the submission which stated: "Pending the designation of other sea lanes through other parts of the archipelagic waters, the right of sea lanes passage may be exercised in the relevant archipelagic waters in accordance with the Law of the Sea Convention, 1982."

For the U.S., support for the Indonesian proposal would hinge on clarifying where the "relevant archipelagic waters" were in which the right of archipelagic sea lanes passage continued to exist. Also needing clarification was a statement in the proposal which affirmed that the right of innocent passage could be exercised throughout



ARCHIPELAGIC SEA LANES

INDONESIAN SUBMISSION TO MSC 69

Figure 2

Indonesia's archipelagic waters, but "recommended" that warships and certain other ships use the sea lanes.

Determining the Criteria for IMO Adoption of Archipelagic Sea Lanes

Although Indonesia had decided to submit its proposal to the IMO, it nonetheless immediately tried to minimize the scope of the IMO's review. In presenting its proposal, Indonesia said the IMO should "consider the matter of designation of archipelagic sea lanes from the point of view of navigation".[68] At a subsequent working group, the Indonesian delegate specified that the IMO's role should be technical in nature-- limited to ensuring the proposed sea lanes were safe to navigate (e.g. adequate aids to navigation, hydrographic surveys, and nautical charts).

This position was not surprising since Indonesia had attempted unsuccessfully to include language in the Law of the Sea Convention that "an archipelagic State shall, inter alia, take into account...the recommendations or technical advice of competent international organizations."[69] The Convention negotiators rejected this narrow approach, as did the delegations at the IMO. Twenty delegations spoke in support of a statement made by Australia that issues broader than technical sufficiency were involved, including the number of normal passage routes and other questions of international law.[70] Consistent with these concerns, the criteria the IMO ultimately established for determining whether or not to adopt (i.e. approve) archipelagic sea lanes proposed for designation included ensuring that the sea lanes were "in accordance with the relevant provisions" of the Convention and determining whether or not the sea lanes proposed included all normal passage routes.[71] Ensuring that international oversight of the

archipelagic sea lane designation process included protecting navigational and overflight rights was an important victory for the U.S., particularly the DoD.

Revised Indonesian Proposal & IMO Partial Archipelagic Sea Lane Process

Following the IMO's initial consideration of Indonesia's proposal, a period of eighteen months followed in which the U.S. and other interested nations consulted with Indonesia both at formal IMO sessions and in inform bilateral meetings. The outcome of this was the creation of a process by which the IMO could adopt an archipelagic sea lane proposal even though it had determined that not all normal passage routes were included (i.e. a "partial system of archipelagic sea lanes"). In this event, the IMO affirmed that "the right of archipelagic sea lanes passage may continue to be exercised through all normal passage routes...in other parts of archipelagic waters...."[72] The process therefore allowed an archipelagic state to designate some sea lanes without having to designate them all at once, while also ensuring the navigational and overflight rights of other nations through all other normal passage routes in the archipelago.

The location of all normal routes was not determined by the IMO, since this was not necessary at that stage. However, the U.S. submitted a map to the IMO, generally illustrating other normal passage routes used for international navigation in the Indonesian archipelago.[73] (Figure 3) Australia submitted a similar map (with 2 minor additions to the routes presented by the U.S.). Indonesia made no comment on this information. These maps, along with the unchallenged transits they represent, can be considered evidence of the existence of normal passage routes in the indicated areas.

Indonesian Proposal and Other Normal Routes

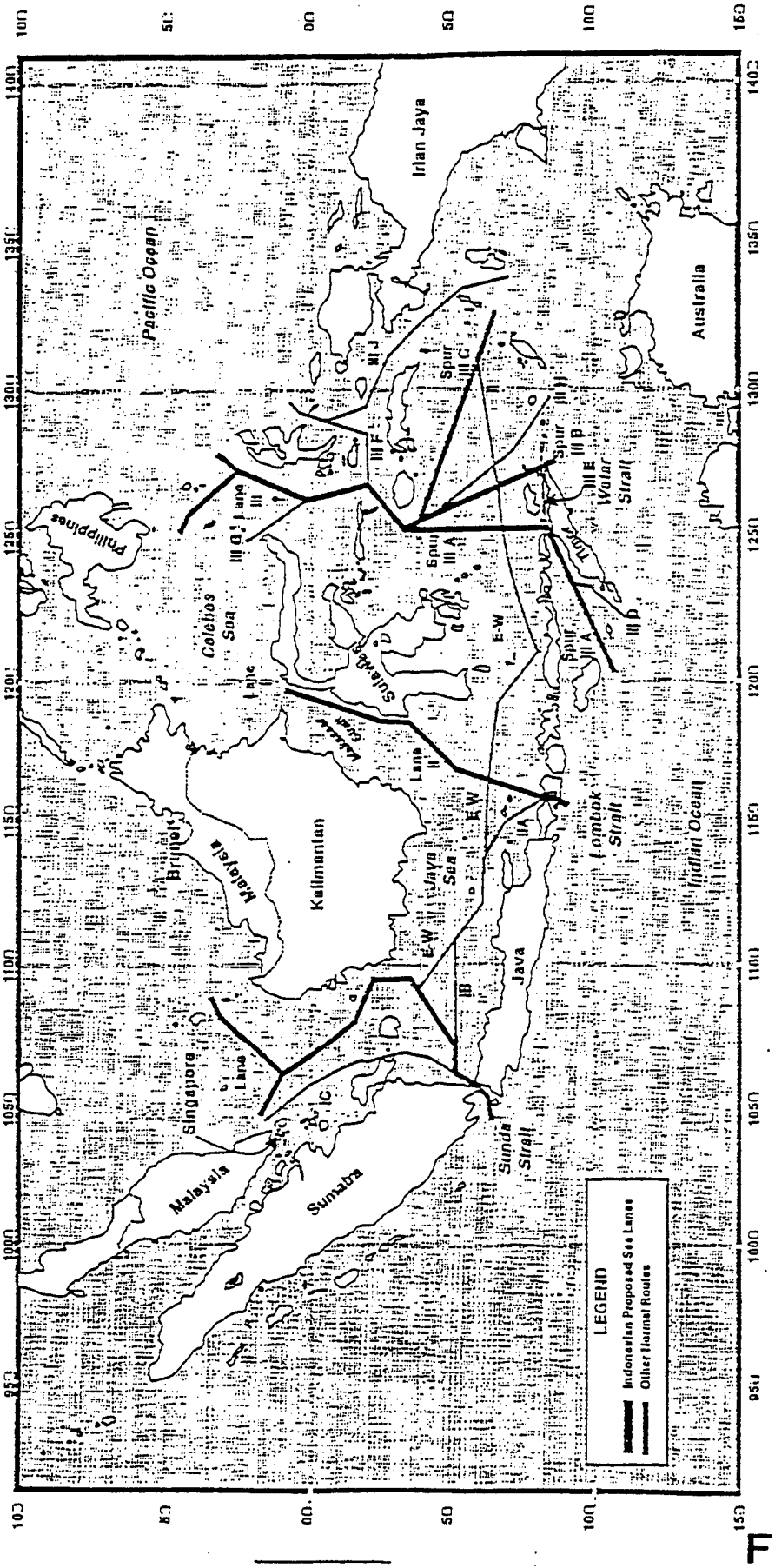


Figure 3

In May, 1998, Indonesia submitted revisions to its proposal to the IMO in order to address the concerns of the U.S. and other nations.[74] In it, Indonesia acknowledged that its proposal was only a partial system of archipelagic sea lanes and that therefore the right of archipelagic sea lanes passage may be exercised in all other normal passage routes, specifically including "an east-west route and other associated spurs and connectors". Indonesia also reaffirmed the right of innocent passage through its territorial sea and archipelagic waters. Finally, in response to suggestions from the U.S. DoD, the revision also made several changes to the coordinates of the three sea lanes. While these changes did not appreciably change the overall shape or length of the sea lanes, they did shift them in several places to permit wherever possible the full 50 nautical mile width authorized by the Law of the Sea Convention. The most significant change was in the second sea lane by moving it further off the coast of Sulawesi.

Australian Proposal Regarding Axis Lines and Deep Water Channels

During the period in which several countries were consulting bilaterally with Indonesia on revisions to its proposal, Australia proposed that the axis line (which defines the center of a sea lane) for each of the proposed sea lanes be relocated to the middle of the deep water channel in the area. The effect of this change would be to significantly contract the width of the sea lanes in several areas. While Indonesia readily agreed to reduce the area of its archipelagic waters and territorial sea subject to the right of archipelagic sea lanes passage, the United States objected vigorously.

The Australian proposal apparently arose from a concern that the law of the sea was likely to change over time with regard to archipelagic sea lanes in that the axis line

would become the dividing line for a traffic separation scheme. One-way traffic on either side of the axis line would then be required in all archipelagic sea lanes. The Australian delegation was led by Transportation Department officials, who were concerned that its large merchant ships would continue to have 2-way access to the deep water channel in years to come. The U.S. insisted on locating the axis lines so as to maximize where possible the fully allowable 50 nautical mile width of the sea lanes. The U.S. emphasized the importance of this width to military aircraft and to battle group formations. After discussions between senior officers of the Australian and U.S. navies, Australia reassessed its position and subsequently withdrew it.

Impact of Indonesian Partial Sea Lane System on U.S. Operational Commanders

The IMO adopted the three archipelagic sea lanes proposed by Indonesia in May, 1998.[75] Shortly thereafter, the Indonesian government announced that it expected to designate the sea lanes in 1999.[76] The IMO requires that sea lanes not come into effect until a date promulgated by the archipelagic state, which must be at least six months after the archipelagic state designates them.[77] However, with the fall of the Suharto government, Indonesia has yet to announce either its designation of the sea lanes or a date upon which they will take effect.

Should Indonesia take the last step and designate the three sea lanes, there will be no impact for U.S. operational planners. The number and general location of available routes for transiting the Indonesian archipelago would remain the same. Equally important is the fact that the rights of archipelagic sea lane passage, transit passage, and

innocent passage would also not be affected by the coming into effect of a partial system of archipelagic sea lanes in Indonesia.

One author has taken a contrary view, suggesting that in wartime, the sea lanes create "geographic decisive points for the enemy at the entry and exit points" of the sea lanes".[78] If this is true, it is no more so than for the current normal passage routes in the same locations and from which the sea lanes would be derived. It is the location of islands and the depth of water which determines these decisive points, not the creation of sea lanes pursuant to international law. It is also questionable that a sea lane is a decisive point, given that fifty nautical miles of sea space provides significant maneuvering room, and enemy forces lying in international waters outside the lanes would be subject to the full range of sensor sweeps and attack from U.S. forces emerging from the sea lanes.

It has also been suggested that in wartime, a neutral archipelagic state could suspend innocent passage, causing all military and civilian traffic to modify the course they normally follow and be channeled into the sea lanes, resulting in increased traffic density and increased likelihood of detection of U.S. forces.[79] This seems unlikely. Sea lanes reflect already existing normal passage routes, and within such routes, all normal navigational channels[80]. Mariners typically operate in such passage routes since that is where the "good water" is located. Therefore, it is most probable that military and civilian traffic will not have to modify their course to enter a sea lane since they will already be operating in that same water. It is also true that operating in dense traffic increases the difficulty for the enemy in identifying targets. International law authorizes a belligerent warship to deceive the enemy (e.g. through false colors, deceptive lighting or signals) into believing it is a merchant vessel so long as it shows its true colors before

going into action and does not feign protected status (e.g. a hospital ship).[81] The effectiveness of this technique would be enhanced by operating among merchant vessels along routes normally used by them.

While the designation of a partial system of sea lanes will not affect operational planners, it will require some changes at the tactical level. Ships, submarines and aircraft will need to remain within the designated sea lane, and will no longer be able to operate as close to the shore as safety permits. When operating near an island, U.S. forces will be subject to the restriction against navigating "closer to the coast than ten percent of the distance between the nearest points on islands bordering the sea lane".[82] The U.S. position is that this restriction applies only to islands intersecting the outer edge of a sea lane, and not to islands either wholly within or wholly without a sea lane. The U.S. also figures the 10 per cent buffer by measuring the distance from the axis line to the shoreline of the island involved.

From an operational standpoint, designation of a partial system of archipelagic sea lanes is preferable to designation of a complete system. This is because in a complete system, international law does not require archipelagic states to include normal passage routes of similar convenience between the same entry and exit points.[83] A complete system is therefore likely to have fewer sea lanes than a partial system will have normal passage routes.

Conclusion

Should Indonesia choose to designate the 3 archipelagic sea lanes adopted by the IMO, there will be no change in planning considerations for operational planners in the

Asia-Pacific theater. Both the sea and air routes critical to mobility within the theater and the international legal rights necessary to operate within these routes will remain unchanged. Nonetheless, operational planners should be knowledgeable concerning the location of these routes and the operating rights of U.S. forces within them as these will take on vastly increased importance in a crisis requiring the significant movement of U.S. forces across the theater.

NOTES

[1] National Defense University, Institute for National Security Studies, Chokepoints: Maritime Economic Concerns in Southeast Asia, (Washington, DC: 1996), 8-9. (The sea lanes pass through the straits of Malacca, Sunda, and Lombok and pass to the west of the Spratly Islands.)

[2] The New Encyclopaedia Britannica, 15th Edition s.v. "Indonesia".

[3] Department of Defense, Maritime Claims Reference Manual, DoD 2005.1-M (Washington, DC 1997), 2-227.

[4] Milan Vego, 46.

[5] National Defense University, 2, 3, 32.

[6] Milan Vego, On Operational Art, (Newport, RI: U.S. Naval War College 1998) 37.

[7] "United Nations Convention on the Law of the Sea", December 10, 1982, UN Doc. A/CONF.62/122, (1983).

[8] President Ronald Reagan, Statement on United States Oceans Policy, Weekly Compilation of Presidential Documents, v. 19, No. 10, 383 (March 14, 1983). (This view has been reiterated by every successive administration.)

[9] Navy Department, U.S. Navy Regulations, (Washington, DC: 1990), Art. 0705.

[10] "United Nations Convention on the Law of the Sea", art. 46. (The Convention defines an "archipelagic State" to be a State "constituted wholly by one or more archipelagoes and may include other islands". It further defines an "archipelago" as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such".)

[11] Ibid., art, 47.

[12] Department of Defense, Maritime Claims Reference Manual 2-221 to 2-232. (Indonesia established archipelagic baselines in 1971. No U.S. protest has been made.) See also J. Peter A. Bernhardt, "The Right of Archipelagic Sea Lanes Passage: A Primer", Virginia Journal of International Law, v. 35, 728. (The author of this article was at the time of its writing the Counselor for Law of the Sea Convention of the U.S. Department of State. The article begins with the note that it represents the official views of the U.S. government. It states that "the baselines promulgated by the principle

archipelagic states are, with but few exceptions, consonant with article 47 and therefore have not been the subject of protests".)

[13] Navy Department, Naval War College, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, (Newport: 1997), 1-24.

[14] "United Nations Convention on the Law of the Sea", arts. 50, 9, 10, 11.

[15] Ibid., arts. 47, 49.

[16] Ibid., arts. 47, 3; Department of Defense, Maritime Claims Reference Manual 2-221.

[17] Ibid. art. 56.

[18] Department of Defense, Maritime Claims Reference Manual, 2-221.

[19] (Although not required by international law, it is also DoD policy that military aircraft operating in international airspace will use ICAO procedures when practical and compatible with their mission in order to enhance safety of flight. See Department of Defense, Use of Airspace by U.S. Military Aircraft and Firings Over the High Seas, DoD 4540.1, (Washington DC, 1981.)

[20] "United Nations Convention on the Law of the Sea", art. 53.

[21] Ibid., art. 53(12). (Paragraph 4 of Article 53 refers to normal passage routes as routes for international navigation **or overflight**. This might lead one to conclude that military aircraft may use the right of archipelagic sea lane passage to transit a route used only for international overflight but not navigation. However, paragraphs 1 and 12 of Article 53 make it clear that air routes exist only above normal routes used for international **navigation** (and sea lanes). The U.S. has officially adopted this position. See J. Peter A. Bernhardt, 736.

[22] "United Nations Convention on the Law of the Sea", arts. 54, 39(3). (Civil aircraft may therefore not overfly normal passage routes (or sea lanes) unless international air routes have been designated above them by ICAO. Once designated, the archipelagic state may not deny them their right of transit.)

[23] Ibid., arts. 58, 87.

[24] Ibid., arts. 52, 17-32.

[25] J. Peter A. Bernhardt, 735-736. (This is based on an analysis of the negotiating history of the U.N. Convention on the Law of the Sea. The nations participating in the

negotiation rejected proposed Convention language which would have limited sea lanes to those normal routes in existence at the time of the ratification of the Convention.)

[26] Myron H. Nordquist et al. eds., United Nations Convention on the Law of the Sea, 1982, A Commentary, (Charlottesville, VA: University of Virginia School of Law, 1993), vol. 2, 335-336, 342-343.

[27] Navy Department, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 2-17.

[28] Department of Defense, Maritime Claims Reference Manual 2-227 and 2-228.

[29] "United Nations Convention on the Law of the Sea", art. 53. (Both paragraphs one and four of Article 53 refer to sea lanes as passing through "archipelagic waters and the adjacent territorial sea". The use of the word "adjacent" immediately preceding "territorial sea" otherwise seem superfluous given that an archipelagic state's territorial sea belt is necessarily seaward of its archipelagic waters. This suggests that "adjacent" is used to convey the idea that a sea lane (or normal passage route where a sea lane has not been designated) exists in a portion of the territorial sea only where it continues from archipelagic waters, connecting the archipelagic waters to the high seas or an EEZ on either side.)

[30] Ibid., arts. 38, 39, 40, 44.

[31] J. Peter A. Bernhardt, 737-743. (This article provides a scholarly analysis of the negotiating history of art. 53(2) and demonstrates an intent by the parties to the United Nations Convention on the Law of the Sea to provide equivalent rights in international straits and sea lanes (or normal passage routes). The article states (at 741) that it is the U.S. position that the two are equivalent.)

[32] "United Nations Convention on the Law of the Sea", arts. 58, 87.

[33] United Nations, U.S. Statement in Right of Reply, Official Records of the Third United Nations Conference on the Law of the Sea (1974-1984), reprinted in Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, Annex A1-1.

[34] Mark Janis, "Neutrality", in Horace B. Robertson, Jr., U.S. Naval War College International War Studies, The Law of Naval Operations (Newport, RI: Naval War College Press, 1991), 148. (The Charter outlaws the use of force except as authorized by the Security Council to restore peace or in self-defense in the absence of Security Council action. Janis notes that some legal scholars argue the law of neutrality continues to exist in the absence of Security Council action. Janis characterizes this as a minority view.)

[35] Ibid., 153.

[36] Horace B. Robertson, Jr., The "New Law of the Sea and The Law of Armed Conflict at Sea, (Newport RI: Naval War College, The Newport Papers, 1992), 2.

[37] Navy Department, The Commander's Handbook on the Law of Naval Operations (NWP 1-14M), (Philadelphia, 1995), chapter 7.

[38] Louise Doswald-Beck, ed., San Remo Manual on International Law Applicable to Armed Conflicts at Sea, (Cambridge UK: International Institute of Humanitarian Law, 1995); International Law Association, "Helsinki Principles on the Law of Maritime Neutrality", (Committee on Maritime Neutrality: 1998) on file with the author.

[39] Horace B. Robertson, Jr., 17, 32-35, 40. (Admiral Robertson provides an excellent analysis of problems which arise by applying the traditional rules to the vast new ocean areas subject to coastal state and archipelagic state sovereignty.)

[40] Ibid., 12-14.

[41] Ibid., 23-27, 31-33.

[42] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 9-9.

[43] Ibid., 14.

[44] Ibid., 14-15. (However, a neutral state may authorize, on non-discriminatory basis, belligerent ships and submarines to enter its ports for no more that 24 hours, and to conduct certain limited repairs and replenishment.)

[45] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 7-15 to 7-16; Louise Doswald-Beck, 102-5; International Law Association, 14; Natalino Ronzitti, ed., The Law of Naval Warfare: A Commentary on the Relevant Agreements and Documents, (Dordrecht, The Netherlands: Martinus Nijhoff Publishers 1988), 15-18.

[46] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 7-11; Louise Doswald-Beck, 107; International Law Association, 6 (Which alone raises the continued viability of the traditional limitation of 24 hours on innocent passage as essential to preventing the use of the territorial sea as a safe haven or base of operations.)

[47] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 7-14 and 7-15; Louise Doswald-Beck, 12-13, 100, 102-107 (The San Remo Manual alone addresses the 24 hour rule with regard to archipelagic sea lanes passage and transit passage. It concludes it does not apply.)

[48] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 7-13 and 7-14; Louise Doswald-Beck, 12-13, 100, 102-107; International Law Association, 6.

[49] Horace B. Robertson, Jr., 23-27; Louise Doswald-Beck, 108-110 (The San Remo Manual adds a duty for belligerents to notify the neutral nation if mines are laid, and to ensure they do not interfere with artificial islands, installations or structures within the EEZ.); International Law Association, 8-9.

[50] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 7-23; Louise Doswald-Beck, 106; International Law Association, 4.

[51] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 9-8 and 9-9; Louise Doswald-Beck, 106; International Law Association, 4.

[52] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 7-6; Louise Doswald-Beck, 101-102 (The San Remo Manual adds an obligation for the opposing belligerent to notify the neutral state of the other belligerent's violation and to give the neutral state a reasonable time to terminate the violation. Thereafter, the opposing belligerent may use force if the violation is a "serious and immediate threat" to its security.); International Law Association, 5.

[53] Milan Vego, 23.

[54] Ibid., 25, 26.

[55] Horace B. Robertson, Jr., 34-35, 17.

[56] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 7-11; Louise Doswald-Beck, 6.

[57] Louise Doswald-Beck, 12, 104. (The San Remo Manual recommends, but does not require, that as a precautionary measure, a neutral state notify the belligerent nation of its exercise of these rights.); International Law Association, 10, 14.

[58] "United Nations Convention on the Law of the Sea", arts. 44, 54.

[59] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 7-24; International Law Association, 14.

[60] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 9-9.

[61] International Law Association, 16.

[62] "United Nations Convention on the Law of the Sea", arts. 38, 39, 53, 54.

[63] Ibid., art. 53(9).

[64] Ibid., art. 53(1) & (4).

[65] J. Peter A. Bernhardt, 745-6.

[66] International Maritime Organization, Maritime Safety Committee, Note by Indonesia, Designation of certain sea lanes and air routes there above through Indonesian archipelagic waters, IMO Doc. MSC 67/7/2, 30 August 1996.

[67] Department of State, United States Intervention: Archipelagic Sea Lanes at MSC67, CAPT J. Ashley Roach, on file with the author.

[68] International Maritime Organization, Maritime Safety Committee, Report of the Maritime Safety Committee on its Sixty-Seventh Session, MSC 67/22, 19 December 1996, 7.31.

[69] J. Peter A. Bernhardt, 750-751.

[70] International Maritime Organization, Maritime Safety Committee, Report of the Maritime Safety Committee on its Sixty-Seventh Session, 7.32, 7.35, 7.37.

[71] International Maritime Organization, Maritime Safety Committee, Amendments to the General Provisions on Ship's Routeing (Resolution A.572(14) as amended, MSC 69/22/Add. 1, Annex to Annex 8, paras. 2.2.2, 3.2.

[72] Ibid., para. 6.7.

[73] International Maritime Organization, Sub-Committee on Safety of Navigation, Adoption of sea lanes in archipelagic waters; Normal routes through the Indonesian archipelago, NAV 43/3/10, 18 April 1997.

[74] International Maritime Organization, Maritime Safety Committee, Designation of certain sea lanes and air routes thereabove through Indonesian archipelagic waters, MSC 69/5/2, 6 February 1998.

[75] International Maritime Organization, Maritime Safety Committee, Resolution MSC.72(69), Adoption, Designation, and Substitution of Archipelagic Sea Lanes, MSC 69/22/Add. 1, Annex 9.

[76] "RI to Open Three Sea-Lanes for International Passage", The Jakarta Post, June 16, 1998, News/Wires. Lexis-Nexis. Dayton, OH:Lexis Nexis. (11 February 1999).

[77] International Maritime Organization, Maritime Safety Committee, Resolution A.572(14), as amended, Amendments to the General Provisions on Ship's Routeing, MSC 69/22/Add.1, Annex 8, pg. 3.

[78] David K. Wright, "Archipelagic Sea Lanes Designation: Considerations for Operational Level Planners", (Unpublished Research Paper, U.S. Naval War College, Newport RI: 1998), 12.

[79] Ibid.

[80] "United Nations Convention on the Law of the Sea", art. 53(4).

[81] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 12-3, 12-4.

[82] "United Nations Convention on the Law of the Sea", art. 53(5).

[83] Ibid., art. 53(4).

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